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# In the Supreme Court of the United States.

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD,
A MINOR, ETC., ET AL.,
PETITIONERS,
vs.
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, ET. AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

## PETITIONERS' REPLY BRIEF

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## Introduction.

Pursuant to Rule 35.3 of the Rules of this Court, petitioners Crawford et al., file this brief in reply to the Brief of Respondent Board of Education of the City of Los Angeles ("Res. Br.") and the Brief of Respondent Bustop. This reply brief is being filed within one week of March 22, 1982, the scheduled date of oral argument in this case.

With the filing of the briefs in defense of Proposition 1, it has become clear that, lacking justifications that could survive strict scrutiny, respondents and their supporters seek to obscure the racial character of the line Proposition 1 draws and of the results it designedly causes. This Court should reject that attempt.

### I. Because Proposition 1 is "Undeniably a Classification Based on Race,"[1] it Must Fall Absent a Compelling Justification which Precisely Fits that Classification.

Neither of the respondents nor any of the *amici* filing briefs on their behalf offers anything resembling a compelling justification for the precise line drawn by Proposition 1. Yet that line is unmistakably race-specific, in several respects: under Proposition 1, *only the goal of desegregating minority schools* must be pursued without state judicial assistance in obtaining whatever pupil assignment or transportation may be needed to vindicate state constitutional rights; *only racial minorities* must prove *two* constitutional violations (both state *and* federal) to overcome the barrier created by Proposition 1 to the judicial ordering of potentially indispensable relief; and *only integration decrees* remain continually subject to challenge by "any interested person." *See* Pet. Br. at 42-48.

Unless Proposition 1's defenders can somehow show that, despite these race-specific features, "the classification on its face is racially neutral" after all, petitioners need not "establish an

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[1] *University of California Regents* v. *Bakke*, 438 U.S. 265, 289 (1978) (Powell, J., announcing judgment).

intent to discriminate" before triggering the demand for compelling justification:[2] with exceptions not relevant here, "[r]acial and ethnic distinctions *of any sort* are inherently suspect and thus call for the most exacting judicial examination."[3] For this reason, the board and its supporters labor mightily to recast Proposition 1 as a facially neutral measure. Petitioners address their several attempts in turn.

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[2] *Id.* n.27, contrasting *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977).

[3] *Bakke*, 438 U.S. at 291 (Powell, J.) (emphasis added); *see also id.* at 294 n.34. *Accord, Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979) ("racial classification[s], regardless of purported motivation, [are] presumptively invalid and can be upheld only upon an extraordinary justification"). This proposition holds even with respect to classifications that operate within government's own processes, purport to be neutral, impose no direct burden on anyone's liberty, and apply to all races. *See, e.g., Anderson* v. *Martin*, 375 U.S. 399 (1964) (voiding state requirement that race of every candidate be designated on nominating papers and ballots).

Reduced scrutiny may, of course, be proper when the racial classification in question affects only an innocuous aspect of bureaucratic structure or record-keeping, as in *Tancil* v. *Woolls*, 379 U.S. 19 (1964) (per curiam), *aff'g* 230 F.Supp. 156 (E.D. Va. 1964) (upholding requirement that race of parties be recorded on divorce decrees). *Tancil* seems the strongest available support for *Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980), which upheld a change in the mechanisms available to the Department of Health, Education and Welfare (HEW) and the Department of Justice (DOJ), collectively, to assure that no federal funds go to segregated school districts. *Prior* to the change, HEW could condition continued funding on a district's adoption of a transportation remedy — subject to later judicial review of HEW's conclusion that desegregation required such a remedy. *After* the change, HEW still had an enforceable "obligation to assure no federal moneys support segregated schools," *id.* at 1236, and could still "initiate its administrative proceedings if busing [was] only one of multiple possible remedies for a noncomplying district," *id.* n.89, but would have to refer the matter to DOJ for immediate litigation if the district was one in which HEW believed *only* a transportation remedy would suffice. *Id.* at 1231-1233, 1235-1236. Thus, as the Government explained the narrow change at issue in *Brown*, it "merely replace[d] eventual judicial review of HEW action with initial resort to the courts for districts which HEW believes need a transportation remedy." *Id.* at 1236 n.89.

It has also been argued that "racial classifications designed to further remedial purposes" need only survive a form of scrutiny which, while beyond the minimal, is less than strict. *Bakke*, 438 U.S. at 358-359 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and

### A. *Distorting the Actual Reach of Proposition 1 To Conceal its Race-Specific Scope.*

Making an argument never before advanced by anyone in this litigation, the board boldly states: "The classification that Proposition 1 makes among remedies is by no means racial. It plainly prohibits a state court from ordering *any* busing that is not required to remedy a Fourteenth Amendment violation, and neither its language nor the Attorney General's official ballot summary (J.A. 257-258) mentions either race or desegregation." (Res. Br. 37 n.24; emphasis added.) Quite apart from the concession of Proposition 1's author and chief sponsor that court-ordered "busing" is itself a "buzzword,"[4] the board's statement is simply false. For Proposition 1 (unlike, for example, Initiative 350, at issue in No. 81-9) *does* explicitly refer to matters of race — by providing that "[n]othing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a *school integration plan* . . . ." If the amendment's prohibition indeed applied to court-ordered "pupil school assignment or pupil transportation" *for any purpose whatever*, then this race-specific proviso would obviously make no sense.[5] Thus the board is more

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dissenting in part). *See also Fullilove* v. *Klutznick*, 448 U.S. 448, 482-484 (1980) (Burger, C.J., announcing judgment). But the classification in this case manifestly falls outside both the "plainly innocuous" and the "clearly remedial" categories.

[4] After Senator Robbins repeatedly employed the phrase "forced busing" on a campaign swing through Fresno, he was asked, "Isn't that a buzzword?" As reported by *The Fresno Bee*, Robbins replied, "Yes . . . . [t]hat's why we use it." J.A. 243.

[5] Proposition 1 would in that event assure that local school boards maintained authority to reassign or transport students in order to desegregate schools, without similarly assuring that like authority was retained by school boards to satisfy the educational needs of the handicapped, to relieve overcrowding, and to provide "distance" or "hazard" busing. Yet in many such situations — overcrowding, for instance — reassigning only those pupils who *ask* to be transported to non-neighborhood schools might prove as unfair and ineffective a solution as it does with respect to disproportionately minority schools in minority neighborhoods. It thus seems most unlikely that Proposi-

faithful to the actual reach of Proposition 1 when it concedes elsewhere that Proposition 1, as written and as construed by the court of appeal, deals "*only* [with] the power of a state court to order mandatory reassignment of students *as a remedy for . . . racial imbalance*." (Res. Br. 28; emphasis added.) *See also* Opposition to Cert. at 9. Indeed, never before has any proponent *or* opponent of Proposition 1 even intimated that the amendment might forbid court-ordered student assignment or transportation for purposes other than the relief of racial isolation.[6] Certainly no such meaning or intent was ever disclosed to the California voters who approved Proposition 1 — and who might well have been reluctant to deny handicapped children, children who live great distances from school, children who must traverse special hazards to reach school, or children at overcrowded schools, the ability to secure court-ordered reassignment remedies where local school boards proved unwilling to furnish transportation conceivably required by the California Constitution.[7]

Thus text, common understanding, and the authoritative construction below (Pet. Br. 35-36) converge: Proposition 1 embraced *only* student assignment and transportation *for the purpose of racial desegregation*.[8]

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tion 1 was meant to prevent school boards from reassigning and transporting pupils as the boards might deem necessary not solely to desegregate but in all these contexts. If Proposition 1's ban on judicial orders *compelling* school boards to adopt reassignment plans were truly to extend beyond desegregation, however, then the proviso would surely have read: "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a *pupil assignment or transportation plan* . . . ."

[6] Typical is this statement by the County of Los Angeles in its *amicus* brief on the board's behalf at 22: "Proposition 1 only changed the California law with regard to Court-ordered mandatory reassignment of pupils to remedy purely *de facto* segregation."

[7] California law specifically requires that ballot descriptions for all propositions placed before the electorate fully and fairly disclose to voters the nature of the measures presented to them. *See Amador Valley Joint Union High School District* v. *State Board of Equalization*, 22 Cal. 3d 208, 231, 243 (1978).

[8] The Analysis by Legislative Analyst, for example, concerns solely "segregation" and "desegregation;" the "Background" statement describes

B. *Misstating the Relation Between Proposition 1 and Pre-Existing California Law to Paint the Amendment's Racial Classification as a Mere Corollary of Repealing the Prior Law.*

Where a state has given racial minorities as such a right or remedy not required by the Fourteenth Amendment itself, the subsequent rescission of that step, without more, is by definition a race-specific action — but has not been deemed the sort of racial classification that *automatically* triggers strict judicial

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desegregation law under the federal and California Constitutions, the basis and status of ongoing California desegregation cases, and the possibility of more such cases in the future; and the "Proposal" description states that the "proposition would limit the power of California courts to require desegregation." *See* J.A. 258-260. The ballot arguments in favor of Proposition 1 also refer exclusively to matters of segregation and desegregation. Thus, State Senator Alan Robbins, the amendment's author, directs attention to "COURT-ORDERED COMPULSORY BUSING," "[*t*]*he racial tension and strife of compulsory busing*," and "the conclusion that forced busing is *not* a useful tool in achieving desegregation . . . ." J.A. 267 (capital letters and emphasis in original).

Senator Robbins' Brief in Support of Respondent describes Proposition 1 as designed "to repeal independent State authorization for mandatory busing" because "it was counter-productive to our goal of harmonious race relations and counter-productive to the achievement of student integration." *Id.* at 2. Respondent Bustop, a supporter of Proposition 1 and intervenor in the litigation below, likewise recites the Question Presented solely in terms of "mandatory reassignment of students *on the basis of race*." (Emphasis added.)

If Proposition 1 were given the construction now advanced by the board and Solicitor General, with every word reaching as far as a literal reading, independent of context, could possibly take it, then even Judge Lopez' decree of September 10, 1981 — ordering the board to "locat[e] new magnet schools in minority neighborhoods, maintain[ ] a lower student-teacher ratio in predominantly minority schools, and permit[ ] all interested minority students to participate in the PWT [one-way busing] program," Res. Br. 20 n.9 — would seem to violate Proposition 1's ban on judicial imposition of "*any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation*" unless a Fourteenth Amendment violation is demonstrated. Yet no respondent or *amicus* urges any such reading of Proposition 1 — evidently realizing that, were the amendment so sweepingly construed, it would too conspicuously bar *any* court-ordered progress toward desegregation whenever it applied.

scrutiny. *See Dayton Board of Education* v. *Brinkman (Dayton I)*, 433 U.S. 406, 413-414 (1977); *Hunter* v. *Erickson*, 393 U.S. 385, 390 n.5 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369, 376, 380-381 (1967). In relying on this principle to save Proposition 1 from the requirement of a compelling justification, the board (Res. Br. 33) and the Solicitor General (U.S. Br. 12, 20 n.17) completely misstate how Proposition 1 relates to the legal regime it replaced.

*First*, the pre-existing law — under which there was a judicially enforceable duty to "alleviate racial imbalance in schools regardless of its cause" by all "reasonably feasible" steps, including busing, *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 881 (1963) — *never* represented a special rule for racial minorities but was grounded in the broad view California courts had taken (1) of the "right to an equal opportunity for education," *id.* at 882; *Serrano* v. *Priest*, 5 Cal. 3d 584, 601-610 (1971); (2) of the plenary authority of the state's school boards, *Crawford I*, 17 Cal. 3d 280, 294 (1976); and (3) of the state's responsibility for how school segregation was affected by the housing and other decisions of "state entities other than school boards." *Id.* at 299.[9] Characteristically, for example, the California courts have explained their refusal to treat school district boundaries as sacrosanct in fulfilling the integration mandate of *Jackson* and *Crawford I* by indicating that state courts have the same power to reach across district lines when needed to remedy *de facto* school segregation as they have to cross such lines when needed to remedy state "constitutional violations arising from discrimination in voting rights . . . . and discrimination in school financing." *Tinsley* v. *Palo Alto Unified School District*, 91 Cal. App. 3d 871, 907 (1979), *pet. for hearing den.*, June 7, 1979. In these circumstances, Proposition 1's race-specific withdrawal of state protec-

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[9] This is a complete answer to respondent Bustop's argument that the court-ordered remedial actions barred by Proposition 1 were already impermissibly race-specific under the Fourteenth Amendment. *See* Brief of Respondent Bustop at 4-7. *See also* n.3 *supra*.

tion — even if it *were* seen as a repeal of pre-existing rights — would have to be understood as selectively subtracting racial isolation, and racial isolation alone, from the list of wrongs regarding which California law had previously imposed effect-oriented duties independent of cause, intent, and such matters as local boundaries.

*Second*, Proposition 1 does not in fact constitute a repeal of prior rights at all. Despite the Solicitor General's claim that Proposition 1 does not make California's "right . . . to attend schools free of racial isolation, whatever the isolation's cause, . . . more difficult [to protect] than . . . other state rights . . . but redefines the underlying substantive right [itself]" (U.S. Br. 18-19; *see also* Res. Br. 26), the court below plainly held that Proposition 1 has no such structure. *See* Pet. Br. 38 & n.19. And the Solicitor General concedes, several pages after making the claim quoted above, that "under the Proposition, California school boards retain an affirmative obligation, beyond that mandated by the Fourteenth Amendment, to take steps to alleviate racial isolation, whatever its cause." (U.S. Br. 23 n.23.)

*Third*, whatever Proposition 1 is regarded as *repealing*, its major thrust, just as in *Hunter*, is not simply to remove, on a one-shot basis, the body of law that preceded it, but *retroactively* to cancel all gains previously made under that body of law, and *prospectively* to build into the state's constitution a permanent bar to any renewed imposition or invocation of the prior law's anti-discrimination devices -- the devices wiped out by the amendment. Thus it is not Proposition 1's mere *rescission* of *anything* "in and of itself," *Dayton I*, 433 U.S. at 414, *quoting Brinkman* v. *Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974), that petitioners have *ever* challenged as a forbidden classification by race.

### C. *Denying that Obstacles to Racial Desegregation as Such Constitute Racial Classifications At All.*

As a final gambit, the Solicitor General advances the curious argument that, although "Proposition 1 is indeed 'race-speci-

fic' in the sense that its obvious concern is the issue of racial isolation in California public schools" (U.S. Br. 16), Proposition 1 may nonetheless escape strict scrutiny because it "does not split the California *citizenry* into racial categories" (*id.* 17), either in terms of the groups who would have *invoked* the desegregation remedies barred by Proposition 1 or in terms of the groups who *favor* leaving courts with power to award those remedies. (*Id.*; *see also* Res. Br. 16.)

The short answer is that the Fourteenth Amendment protects *individuals*, not *groups*; it mandates judicial suspicion toward racial *classifications*, not special solicitude toward racial *classes*. Thus it mattered not that the city charter struck down in *Hunter*, 393 U.S. at 390, drew "no distinctions among racial and religious groups," subjecting "Negroes and whites, Jews and Catholics . . . to the same requirements if there is housing discrimination against them which they wish to end." What respondent board and the *Hunter* Court both describe as the amendment's "clear violation of the Equal Protection Clause," Res. Br. 34-35, was simply its "explicitly racial classification treating racial housing matters differently from other racial and housing matters." 393 U.S. at 389. *Accord*, *Lee* v. *Nyquist*, 402 U.S. 935 (1972), *aff'g* 318 F.Supp. 710 (W.D.N.Y. 1970); *Evans* v. *Buchanan*, 393 F.Supp. 428, 441 (D.Del. 1975) (three-judge court), *aff'd* 423 U.S. 963 (1975).

It is no coincidence that such a difference in treatment, whether in housing or in education, "impacts upon an area of traditionally high minority concern" (U.S. Br. 16 n.15): to regard racial segregation as involving no *discrimination* since whites no less than blacks, Hispanics, and other minorities are separated by the practice is to forget that "separate" in this field is "inherently unequal." *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954); *see Loving* v. *Virginia*, 388 U.S. 1, 8 (1964); *Anderson* v. *Martin*, *supra*, 375 U.S. at 403; *Goss* v. *Board of Education*, 373 U.S. 638, 688 (1963). Contrast *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

Indeed, far from disproving Proposition 1's nature as a racial classification, the Solicitor General's concession that the measure divides *legal rights* along racial lines, *see* n.13 *infra*, underscores its presumptive invalidity as a device of segregation and deepens the case for strict scrutiny.

## II. The Need for Compelling Justification is Doubly Clear Because Proposition 1 Splits the State's *Judicial System* Into Two Parts: One Court System for Minorities and Their Rights to Desegregation, Another for Everyone Else.

For over a century, this Court has acted on the explicit premise that each state's *courts*, above all, would remain fully available to vindicate not only federal rights but all applicable state law claims — particularly claims of racial discrimination, however caused, in public places.[10] That premise has

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[10] In the *Civil Rights Cases*, 109 U.S. 3 (1883), when this Court held that the Fourteenth Amendment gave Congress no power to redress purely private racial discrimination by common carriers, *id.* at 9-10, the Court expressly assumed that state courts would provide such redress. *Id.* at 17, 19. The axiom of full and equal access to state courts was indeed at the center of concern for those who wrote the Fourteenth Amendment. *See* C. Fairman, Reconstruction and Revision, Part I, 1295 (1971) (quoting Senator Howard). *Cf. Strauder* v. *West Virginia*, 100 U.S. 303, 307 (1880). Ever since, this Court "has held that the due process clauses protect civil litigants who seek recourse in the courts . . . to redress grievances." *Laverne* v. *Zimmerman*, 50 U.S.L. Week 4247, 4249 (U.S. Feb. 24, 1982). Thus "a state-created right to redress discrimination" is an "interest [protected] under the Fourteenth Amendment," *id.* at 4250; a state's freedom to "eliminate [such a right] altogether" does not extend to "procedural limitation[s] on the . . . ability to assert [it]." *Id.* Such limitations, even if not drawn along suspect lines, violate equal protection as well as due process if they are "arbitrary." *Id.* at 4253 (Blackmun, J., joined by Brennan, Marshall, and O'Connor, JJ., concurring); *id.* (Powell, J., joined by Rehnquist, J., concurring in judgment). *Cf. Lindsey* v. *Normet*, 405 U.S. 56, 78-79 (1972).

On the premise of state-court availability, *see generally* Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L.Rev. 1362 (1953); *cf.* Bator, "The State Courts and Fed-

often been reasserted in this Court's decisions limiting access to the federal judiciary.[11]

Proposition 1 defeats this premise in one crucial area: those who assert rights to desegregation under state law (*Crawford I*, 17 Cal. 3d at 303) are fenced out of full and unimpeded access to state judicial vindication precisely when resort to a federal forum would be unavailing. Limiting access to state judicial remedies in this way "is the very essence of arbitrary state action," *Laverne*, *supra*, at 4253, for it is both irrational in its own terms and indefensible in terms of the most basic postulates of federal-state relations.[12] Worse, it preserves a first-class judicial system for whites and for educational problems unrelated to race, while erecting a second-class and radically

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eral Constitutional Litigation," 22 Wm. & M. L.Rev. 605, 625-31 (1981); O'Connor, "Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge," 22 Wm. & M. L.Rev. 801, 814 (1981).

[11] *See, e.g., Parratt* v. *Taylor*, 451 U.S. 527, 541 (1981); *Ingraham* v. *Wright*, 430 U.S. 651, 672-80 (1977); *Paul* v. *Davis*, 424 U.S. 693, 701, 712 (1976); *Rizzo* v. *Goode*, 423 U.S. 362, 373-81 (1976); *O'Shea* v. *Littleton*, 414 U.S. 488, 491, 493, 498-502 (1974); *Younger* v. *Harris*, 401 U.S. 37 (1971).

[12] Nothing in the text or background of Proposition 1, or in any defense ever offered for it, explains why California courts in desegregation cases should automatically mirror all the separation-of-powers, federalism, and statutory limits that bind federal courts, refusing to award decrees that even federal courts would have awarded but for considerations of federal-state comity.

Moreover, to the degree that this Court's intent requirement in equal protection cases stems from respect for state and local autonomy, *cf. Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980) (Stewart, J.), even state court remedies for *de facto*, unintentional violations might properly rest, in some circumstances, directly on Fourteenth Amendment grounds. Finally, that at least some otherwise *de facto* discrimination in public schools might indeed *become* a matter of state responsibility, and might in that sense become *de jure*, once a state deliberately disabled its courts from remedying such discrimination, could well follow from the approach of the *Civil Rights Cases*, *supra*. *See Bell* v. *Maryland*, 378 U.S. 226, 306-07 & n.25 (1964) (Goldberg, J., concurring).

restricted judicial system for minorities and for problems of racial isolation in public schools. *See* Pet. Br. 30-33, 42-53.[13]

Never refuting this central point, the board rests on the assertion that Proposition 1 "incorporates the . . . Fourteenth Amendment as the governing standard" and "does not create 'obstacles' for school desegregation any more than the Fourteenth Amendment itself." (Res. Br. 19; *id.* 16.) Not only is this unresponsive; it is false. For the fact is that Proposition 1 expressly conditions state court relief upon proof of a substantive Fourteenth Amendment violation *and* a showing that the relief sought *could be imposed by "a federal court . . .* under federal decisional law . . . to remedy the specific violation." Article I, § 7(a)(2) (emphasis added). As the board puts it, Proposition 1 makes a state court's powers "identical to those of a federal court operating under the same facts and circumstances." (Res. Br. 20.) Thus the court below asked at the outset whether a federal court would do what petitioners had asked the state courts to do. (Res. Br. 6; Pet. App. 48A-49A.) But federal court authority to adjudicate and remedy legal wrongs depends upon more than the applicable substantive rules; it depends, too, upon institutional limits derived from Article III separation-of-powers principles, from principles of federalism, and from the relevant statutory limits on federal jurisdiction.[14] If, therefore, "federal decisional law" would

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[13] Discussing this aspect of petitioners' analysis, the Solicitor General calls "ingenious" the argument that "Proposition 1 *singles out a right* afforded . . . school children under [California] law to attend schools free from racial isolation, whatever the isolation's cause, and subjects [*that one*] *right to an unusual judicial process* that makes protection of the right substantially more difficult than protection of other state rights." (U.S. Br. 18; emphasis added). But no ingenuity is needed to see that the racial gerrymander worked by Proposition 1, unlike that challenged by the Seattle School District in No. 81-9, cuts through the very core of the state's court system. The Solicitor General all but concedes the point when he describes as "'race-specific'" Proposition 1's focus upon "the *issue of racial isolation*" as such. (U.S. Br. 16) (emphasis added).

[14] *See generally* Sager, "Fair Measure: The Legal Status of Judicially Underenforced Constitutional Norms," 91 Harv. L.Rev. 1212 (1978) (Four-

have defeated desegregation plaintiffs such as petitioners had they sought federal court relief, the reason may well be peculiar to the forum involved, and may indeed presuppose the availability of state judicial relief for the identical claim. *See* nn.10-12 *supra*. Yet Proposition 1 automatically slams the state court's doors on such plaintiffs whenever federal courts would do so — even where the plaintiffs' claims for relief have substantive merit under the Fourteenth Amendment,[15] or might be treated as having such merit but for a federal judicial concern to avoid intrusion into state autonomy.[16]

Such an Alphonse-and-Gaston routine, whereby state courts must step aside just because federal courts, deferring to the states, would have done the same, is utterly senseless. At the very least, therefore, strict scrutiny is required not only because Proposition 1 creates a dual court system but also

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teenth Amendment norms have substantive reach beyond the bounds within which *federal courts*, for reasons of federal-state relations and separation-of-powers, are themselves able to enforce such norms).

[15] Thus a California court prior to Proposition 1 would have enjoined state officials, in a suit by black parents or taxpayers, *see White* v. *Davis*, 13 Cal. 3d 757 (1975), from busing white pupils to all-white private schools at public expense. But even though such public support for private segregation violates the Fourteenth Amendment, *see Norwood* v. *Harrison*, 413 U.S. 455 (1973), the Solicitor General has argued that a federal court cannot hear such a suit. *See* Pet. for Cert. in *Regan* v. *Wright*, No. 81-970. On that view, Proposition 1 would automatically insulate this Fourteenth Amendment violation from redress in California's courts as well.

[16] *See* nn.10-12, 14 *supra*. Consider court-ordered interdistrict pupil assignments to remedy segregation not caused by the defendant school district. Partly out of respect for state autonomy, this Court has defined both liability and remedy in that context so as to avoid federal "'judicial interference with state prerogatives concerning the organization of local governments.'" *Hills* v. *Gautreaux*, 425 U.S. 282, 296 n.12 (1976) (upholding interdistrict remedy against *federal* agency) (quoting *amicus* memorandum of U.S. Gov't. in *Milliken* v. *Bradley*, 418 U.S. 717 (1974)); *cf. Milliken*, 418 U.S. at 741-43. But these reasons have no relevance to California's *own* courts; having disregarded local district boundaries in voting and school finance cases, the state's courts lack any neutral reason to let their enforcement of desegregation principles, state *or* federal, track district lines. *See Tinsley*, *supra* (declining to do so). Yet Proposition 1 requires just that outcome.

because it reserves for desegregation plaintiffs the burdens of its revolving-door approach to justice, and of the resulting breach in the combined remedial jurisdiction of state and federal courts.[17]

## III. Proposition 1 is Not Compellingly Justified.

The only arguable candidates for such justification are palpably insufficient.[18] Petitioners examine each here.

### A. *The* Quid Pro Quo *Justification: Giving Minorities Fourteenth Amendment Protection "Plus."*

Both the board (Res. Br. 21, 28, 34) and the Solicitor General (U.S. Br. 11-15) argue that Proposition 1 automatically survives the strictest Fourteenth Amendment scrutiny because, by its own terms, it provides all the protection called for by the Fourteenth Amendment — and more. Minorities, it is said, can hardly complain when they receive judicial treatment that may be "separate" but is *more* than "equal" to what the Fourteenth Amendment itself dictates.

To state the argument is to refute it. *First*, the only *relevant* comparison is between how the state's judicial system, given Proposition 1, treats *racial segregation* and how it treats *other* legal wrongs analogously cognizable under the state constitu-

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[17] The very existence of such a breach itself violates due process, *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring), and conflicts with the tacit postulates of federalism. *See* nn. 10-12, 14 *supra*. Thus, to extol such a scheme as an expression of state diversity (Res. Br. 22), or to drape it in the vestments of state experimentation (U.S. Br. 12), mocks the virtues of federalism and makes the values of states' rights into mere masks for racism.

[18] Such "justifications" as savings funds and fuel (Res. Br. A2) are too patently inadequate and ill-fitting to merit extended discussion, as is the "compelling state interest" of letting the people of California have their way. *Amicus* Brief of California 6, 11-12.

tion — such as unequal school finance. To compare the *state and federal* treatments of segregation misses the whole point. *See* Pet. Br. 33-34. *Second*, the argument's premise — that Proposition 1 leaves California's courts fully equipped to vindicate all substantively valid Fourteenth Amendment school desegregation claims — is simply false. *See* Part II *supra*.

### B. *The "What-You-Lost-Wasn't-Worth-Having" Justification: Questioning the Need For, and and Efficacy of, Court-Ordered Busing.*

A second justification suggested by the board (Res. Br. 19-20) and the Solicitor General (U.S. Br. 13, 24, 27) is that Proposition 1 merely abandoned "an experiment that . . . was not working — . . . [the] experiment with busing to alleviate de facto racial segregation," and replaced it with a set of approaches more likely to benefit "public school children, their parents, and the community as a whole." *Id.* at 13.[19]

It has become a familiar observation that court-ordered mandatory pupil reassignment and transportation may at times prove ineffectual or even counterproductive. *See, e.g., Columbus Board of Education* v. *Penick*, 443 U.S. 449, 483 (1979) (Powell, J., dissenting). But it is equally plain that "[i]n some instances busing will be an appropriate and useful element in a desegregation plan." *Crawford I*, 17 Cal. 3d at 309 (emphasis added). *See North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971) ("truly effective remedy" often requires "continued reliance" on busing). *See also* n.25 *infra*.

Thus Proposition 1, if justified in the terms proposed here, fails for want of anything like the requisite "exact connection between justification and classification." *Fullilove*, *supra*, 448 U.S. at 537 (Stevens, J., dissenting). It has been neither

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[19] Construed literally, Proposition 1 would, of course, rule out virtually *all* judicial techniques for desegregation. *See* n.8 *supra*.

"structured with 'precision'" nor "'tailored' narrowly to legitimate objectives," *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973), since its proscription of various remedies is made to depend neither on *findings* as to the value of those remedies in the specific case, nor on precisely tailored *criteria* of likely need and efficacy.[20]

### C. *The "Neighborhood Schools" Justification.*

Evidently borrowing its basic argument from the *Seattle* case (No. 81-9), the Solicitor General argues that Proposition 1 "is merely an expression of support for the maintenance of neighborhood schools." (U.S. Br. 27.) Whatever its merits in *Seattle*, this rationale cannot justify Proposition 1, which simply did not enact a state-wide, race-neutral neighborhood school policy. Indeed, by expressly sanctioning the continuing operation of mandatory, non-neighborhood plans whenever local school boards choose to adopt them, Proposition 1 deliberately eschewed the creation of a state policy that favored neighborhood schools.[21] In no sense is Proposition 1 "precisely tailored to serve a compelling governmental in-

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[20] The existence of popular support for mandatory pupil transportation, as reflected by a school board decision, certainly cannot serve as an accurate enough proxy for an unbiased determination of whether and when various reassignment remedies are needed, and are likely to work. Even with benign racial classifications, "weigh[ing] by the political process" is insufficiently reliable. *Bakke*, *supra*, 438 U.S. at 361 (Brennan, White, Marshall, and Blackmun, JJ.). *A fortiori*, such a political assessment is an insufficient proxy when the classification is challenged as invidious by a racial minority.

[21] As the Solicitor General concedes (U.S. Br. 6 n.5), Proposition 1 permits local boards to adopt "school integration" plans that rely in whole or part upon mandatory non-neighborhood student reassignment and transportation: at the time Proposition 1 was passed, "a number of California school districts . . . voluntarily operated mandatory, non-neighborhood" desegregation programs in satisfaction of their state constitutional obligations. *Id.* *See also* Res. Br. 19, 38.

terest," *Bakke*, 438 U.S. at 299 (opinion of Powell, J.), in neighborhood schools.[22]

## IV. The Court Below Impermissibly Bypassed the Inquiry Mandated by *Arlington Heights*.

The decision below, in upholding Proposition 1, did not even cite, much less follow, this Court's *Arlington Heights* precedent. *See Crawford II*, 113 Cal. App. 3d at 654-55. Rather than finding suspicious the failure of the purposes stated in Proposition 1 or urged in its defense to fit what Proposition 1 actually accomplishes, *see* Part III, *supra*, the court indefensibly treated the amendment's mere incantation of race-neutral objectives as "[a] sufficient answer" to petitioners' entire claim of racially discriminatory impact and intent. 113 Cal. App. 3d at 654.[23] In an observation particularly apposite here, the court in *Brown* v. *Califano*, 627 F.2d 1221, 1231 n.57 (D.C. Cir. 1980), warned that such objectives as "preserving neighborhood schools . . . promoting safety . . . and cutting energy costs . . . have sometimes thinly hidden op-

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[22] *See also Penick*, 443 U.S. at 461 n.8 (rejecting neighborhood school policy justification where optional attendance zones, permitting white students to avoid black schools near their homes, cast doubt on "avowed[ ] . . . preference for neighborhood schools"). Allowing local school boards to desegregate with mandatory inter-neighborhood reassignment plans also forces minorities to entrust their state constitutional rights to the will of the majority — or, more specifically, of the voting majority's elected representatives on the school board. Yet the very meaning of a "right" requires placing it beyond the reach of majorities and officials. *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 625, 638 (1943); *Lucas* v. *Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 736-37 (1964) (state-created rights to vote must be distributed one-vote-per-person even if majority approves another formula).

[23] Contrary to the Solicitor General's argument (U.S. Br. 25), nothing in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975), as quoted in *Michael M.* v. *Superior Court*, 450 U.S. 464, 470 (1981), remotely supports making "the mere recitation of a benign . . . purpose . . . an automatic shield . . . against any inquiry into . . . actual purposes." 420 U.S. at 648.

position to desegregation or equal educational opportunity." And *Brown*, upon which the board relies heavily (Res. Br. 20-21, 32-33, 36, 41), condemned as "unconstitutional" the "aim[ ] of preventing racial assignment as a desegregation remedy . . . . ," 627 F.2d at 1231 n.57, an aim that manifestly animated Proposition 1, at least in part. *See also id.* at 1235 nn. 81, 82.[24]

The board and Solicitor General, completely embracing the opinion below, appear to regard *Arlington Heights* as beside the point on the theory that increased racial isolation in public schools,[25] and even the creation of lasting impediments to using state courts to reduce such racial isolation in minority areas,[26] do not *count* as discrimination against racial

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[24] The board omits from its brief, as if inorganic to the setting, the court-ordered desegregation program, including mandatory pupil transportation, ongoing in Los Angeles when Proposition 1 was passed, and the concern then widely expressed that the program might be expanded to include nearby districts. *Contrast* U.S. Br. 27. *See* Pet. Br. 14-18.

[25] This is indisputably among Proposition 1's consequences. The trial court found below, *e.g.*, that the state's constitutional duty to petitioners could not be met absent some mandatory reassignment. Pet. Br. A16-A23. This finding was not overturned in *Crawford II*, nor in subsequent rulings in this case. Pet. Br. A32-A33.

Ending the court's mandatory program as Proposition 1 required, and replacing it with the program ordered by Judge Lopez this past fall, has, predictably, substantially increased the racial isolation of minority schools previously part of the mandatory program. Pet. Br. A29-A35. At the same time, of the 48 pairs and clusters of schools (all operating within enrollment capacity in the 1980-81 school year) that had been involved in the mandatory program that Proposition 1 ended, twenty-six schools (all but one, predominantly minority) have this year been classified by the board as overcrowded. LAUSD Enrollment Data, Oct., 1981. Thirteen of these schools were placed on a year-round schedule because of this overcrowding. *Id.* Finally, more than 85% of the students participating in the plan now in operation are minority, as are an even larger percentage of the students actually transported. *Id.*

Petitioners are aware of no unreversed federal court decision that has ever found a constitutional mandate to desegregate satisfied by a program making no use of mandatory reassignments.

[26] However construed *facially* (Parts I-II *supra*), Proposition 1 plainly has the *effect* of impeding the use of California courts to desegregate schools in minority neighborhoods.

minorities. *See* Res. Br. 18-20, 41; U.S. Br. 24-25. But the state courts found as a matter of fact,[27] just as *Brown* v. *Board of Education*, 347 U.S. at 494-95, held as a matter of law, that separating racial minorities *in itself* discriminates against such minorities.[28]

Petitioners also offered ample evidence below to buttress the inferences of intent to which Proposition 1's obvious effects, and the circumstances surrounding its sudden and unusual adoption, give rise. Since the trial court, having ruled Proposition 1's constitutionality irrelevant (Res. Br. 43), had no occasion to consider this evidence,[29] the court of appeal should at least have remanded for such consideration once it held Proposition 1 controlling. Instead, in lieu of the "sensitive inquiry into such circumstantial and direct evidence of intent as

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[27] *See Crawford I*, 17 Cal. 3d at 289 (affirming trial court finding "that minority children suffer serious harm when their education takes place in segregated public schools . . . whether such segregation is *de jure* or *de facto*," and that in Los Angeles "the plant, teachers, physical facilities and curriculum" at "minority segregated schools are in fact of poorer quality than . . . at . . . predominantly white schools.").

[28] The *Brown* Court held, quoting from the lower court in the Topeka case, that "*[s]egregation of white and colored children has a detrimental impact upon the colored children.* The impact is greater when it has the sanction of the law . . . ." 347 U.S. at 494 (emphasis added).

[29] Petitioners and the board both briefed at trial the admissibility of the materials petitioners submitted (Res. Br. 43; J.A. 309; 55 C.T. 16484-16513), all of which were presented below and are part of the record here, contrary to the board's claim. Res. Br. 43. That the trial court, deeming Proposition 1 inapplicable, did not rule on admissibility argues at most for *remand* — surely not for *this* Court to resolve that state-law issue. At all events, testimony *admitted* below included evidence probative of discriminatory intent. *See, e.g.*, Pet. Br. 92 n.52; 64 RT 9185, 9213, 9231, 9289; 65 RT 9364-9365, 9378, 9379 (testimony of court-appointed expert Orfield that part of opposition to mandatory reassignment reflects prejudice against racial minorities); 66 RT 9552-9553, 9560 (similar test. of petitioners' expert Rossell); 28 RT 4211 (similar test. of board expert Ross); 57 RT 8482-8483 (similar test. of board witness Jordan, L.A. Assoc. Super. for School Integration, regarding Los Angeles). In accord is expert opinion generally: *e.g.*, Sears, Lau, Tyler & Allen, "Self-Interest versus Symbolic Politics in Policy Attitudes & Presidential Voting," 74 Pol. Sci. Rev. 670 (1980).

may be available," *Arlington Heights*, 429 U.S. at 266, the court derided such inquiry as "pure speculation," 113 Cal. App. 3d at 655, and simply decreed, based on *its* speculation, that, because Proposition 1 "*could* have been [properly] motivated," *id.* (emphasis added), the matter was at an end. Were that the law, *Arlington Heights* would have been written never to be satisfied. Whatever "deference" is owing a conscientious state court effort to ascertain discriminatory purpose and effect, *see* Res. Br. 40, none is due here, where *no* such effort has been made — either, as proper, by the trial court, or by the court of appeal. Thus, this case at minimum must be returned to the state courts with directions to apply *Arlington Heights* appropriately.

## Conclusion.

With just one exception, California's Constitution makes equal educational opportunity a fully enforceable right, giving state courts both the power and the duty to remedy violations — as with schools that are under-funded or overcrowded — that may result from no deliberate state choice to deny equality, and may require remedies that cross neighborhood and district lines. The fact that a federal court would find no Fourteenth Amendment violation or would for some other reason deny the relief sought does not lead the state's courts to follow suit by denying relief themselves — again, with just one exception.

It is *only with respect to claims of racially segregated schooling* that California confers a broad constitutional right of equal opportunity, but then bars its otherwise independent judiciary from fully vindicating that right, requiring its courts to deny pupil assignment and transportation remedies, however necessary in the particular case, precisely when a federal court would refuse this relief, and when the need for such relief from a *state* court is thus at its maximum.

Proposition 1, which created this racially defined and perversely structured gap in the state's judicial apparatus — putting in place a dual court system, with minorities alone relegated to revolving-door justice — should be strictly scrutinized and found wanting. Lacking any neutral, much less compelling, justification, it is racially discriminatory on its face, in its effects, and in its aims. The judgment of the court of appeal, which first ignored Proposition 1's racial classification and then refused even to permit inquiry into its racially discriminatory impact and intent, should accordingly be reversed.

Respectfully submitted,

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